

1989

The State of Utah v. Billy J. Vigil : Brief of Appellant

Utah Court of Appeals

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Paul Van Dam; Utah Attorney General; Attorney for Plaintiff-Respondent.

James L. Shumate; Attorney for Defendant-Appellant.

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DOCKET NO.

890730-CA

THE STATE OF UTAH,
Plaintiff-Respondent,

Case No. 890730-CA

Classification Priority 2

Defendant-Appellant.

Appeal from a Judgment, Sentence, and Commitment on the Third-Degree Felony offense of Possession of a Dangerous Weapon by a Restricted Person following a jury trial in the Fifth District Court for Iron County, State of Utah, the Honorable Dennis L. Draney, District Judge by assignment.

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FILED

MAY 10 1990

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	Case No. 890730-CA
)	
BILLY J. VIGIL,)	Classification Priority 2
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

Appeal from a Judgment, Sentence, and Commitment on the Third-Degree Felony offense of Possession of a Dangerous Weapon by a Restricted Person following a jury trial in the Fifth District Court for Iron County, State of Utah, the Honorable Dennis L. Draney, District Judge by assignment.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	
)	Case No. 890730-CA
vs.)	
)	
BILLY J. VIGIL,)	
)	
Defendant-Appellant.)	

JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Court of Appeals is established by 78-2a-3(a)(f), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from a Judgment, Sentence, and Commitment from the Fifth District Court of Iron County, State of Utah, the Honorable Dennis L. Draney, District Judge by assignment, presiding, wherein the Defendant was convicted and sentenced to the Utah State Prison on the Third-Degree Felony offense of Possession of a Dangerous Weapon by a Restricted Person.

ISSUES PRESENTED ON APPEAL

The issues presented by this appeal are the appropriateness of the retrial of the Defendant after the Motion for mistrial was granted on September 25, 1989, and the sufficiency of the evidence to convict the Defendant when there was no evidence that he ever used any of the items offered into evidence as "dangerous weapons".

DETERMINATIVE STATUTES OR RULES

The statute which is believed to be determinative in this matter is 76-10-501(2), Utah Code Annotated, 1953, as amended. This statute is reproduced in total as the addendum to this brief.

NATURE OF THE CASE

This is an appeal of a conviction after a jury trial wherein the Defendant was convicted of Possession of a Dangerous Weapon by a Restricted Person.

COURSE OF THE PROCEEDINGS

This matter was first set for trial on September 25, 1989, but was halted after the Defendant moved for a mistrial bases on an answer given by Agent J. Lowe Barton from the Utah State Department of Corrections Adult Probation and Parole Department. After the mistrial was granted, the trial was reset for December 11, 1989. The Defendant objected to the resetting of the matter for trial and moved to dismiss on the grounds of double jeopardy, but the motion was denied. The case was retried on December 11, 1989. The Defendant was convicted at that trial.

DISPOSITION AT TRIAL COURT

Following the Defendant's conviction at trial, the Defendant was sentenced to serve zero to five years at the Utah State Prison.

STATEMENT OF FACTS

On April 1, 1989, agents of the Utah State Department

of Corrections Adult Probation and Parole Department observed the Defendant, Billy Vigil, in the possession of certain color television sets at the Cedar Post pawn shop in Cedar City. (T.19-20) Because Mr. Vigil was a parolee under the supervision of the Department of Corrections, the officers completed their previous business and returned to the pawn shop to ask what Mr. Vigil was doing with these television sets. The person at the pawn shop reported that Mr. Vigil was buying the television sets for his employer at the American Siesta Motel, in Cedar City, but also reported to the agents that Mr. Vigil appeared to be under the influence of alcohol. (T.21) The agents then went to Mr. Vigil's room at the American Siesta Motel and there found him to be under the influence of alcohol. (T.21) They arrested Mr. Vigil and then searched his possessions finding several knives in a bag inside the closet of the motel room. (T.22-23) Also in the bag were a martial arts "throwing star" and a pair of "num-chucks", which are also martial arts equipment. (T.23) A search of Mr. Vigil's truck also yielded another knife in a scabbard. (T.24) There is no evidence that Mr. Vigil ever handled or used any of these items in any fashion--either aggressively or non-aggressively. The matter was first scheduled for trial on September 25, 1989. The Defendant was present at that time as were all of the witnesses needed for trial, and a jury was impaneled and the matter proceeded before the Honorable Cullen Y. Christensen. After the State had rested and the Defendant began his case in chief, Agent J. Lowe Barton

of the Utah State Department of Adult Probation and Parole was called to testify. During examination by the undersigned counsel for the Defendant, the questioning went as follows:

By Mr. Shumate

Q. Did you ever discuss with him the size or number or character of knives that he could or could not own as a parolee?

A. We never, as I recall, got into exact specifics on knife sizes. In, I don't recall the date, but the, last time that he was convicted of a felony it was for possession of a straight razor.

At that time, the undersigned moved for Judge Christensen to declare a mistrial which the Judge did. (Transcript of trial hearing, September 25, 1989.) On October 10, 1989, a Motion was prepared and mailed to the Clerk of the Court to dismiss the case against Mr. Vigil by virtue of the improper termination of the earlier trial. That Motion was denied by Judge J. Philip Eves on October 17, 1989.

SUMMARY OF ARGUMENT

The Court improperly denied the Motion to Dismiss and reset the matter for trial when the first trial had to be terminated through no fault of the Defendant but by reason of the State's witness volunteering inappropriate evidence before the trial jury. This Defendant-Appellant argues to the court that when items are claimed by the State of Utah to be dangerous weapons and the items inherently have both deadly and non-deadly potentials the State must show some evidence of their use as

dangerous weapons in order to convict a person of the possession of a deadly weapon.

ARGUMENT

POINT I

WHILE, UNDER PRESENT UTAH LAW, THE TRIAL JUDGE WAS WITHIN HIS DISCRETION TO DENY THE MOTION TO DISMISS, THE PRESENT STATE OF UTAH LAW IMPOSES AN UNREASONABLE BURDEN UPON CRIMINAL DEFENDANTS AND DENIES THEM DUE PROCESS OF LAW WHEN, THROUGH NO FAULT OF THEIR OWN, THE STATE'S AGENTS VOLUNTEER EVIDENCE TAINTING A JURY TRIAL.

This Defendant-Appellant understands that under the present state of the law in the State of Utah in order for a mistrial to be dispositive of the case it must usually be declared over the objection of the Defendant. If the Defendant moves for the mistrial and the motion is granted, the law deems that the Defendant has waived any claim of double jeopardy. (State v. Ambrose, 598 P.2d 354 {Utah, 1979}) In the present circumstances, this Defendant was forced to request a mistrial because of the misconduct of the State's probation agent volunteering additional information about the Defendant's prior criminal record. Both the State and the Defendant had agreed to stipulate to the fact that the Defendant was on parole in order to keep the specifics of the Defendant's criminal record from improperly coming before the trial jury. The present state of the law requires the Defendant to show that the State or the Court acted in bad faith in placing the tainted information

before the jury before he can be deemed to have not waived his rights under the double jeopardy clause. (State v. Jones, 645 P.2d 656{Utah, 1982}) The standard of proof for such a claim is so high that in practical terms no criminal defendant will ever be able to establish that the State of Utah did in bad faith act to place evidence before the jury that would cause a mistrial. This Defendant asserts to this court that such a standard is unreasonable and that he should be given the opportunity to argue for a mistrial in these circumstances without waiving his right to be free from double jeopardy. It should also be noted that the testimony which provoked the Defendant's mistrial motion came from the State's probation agent, not from the prosecutor or the Court. The present state of the law places the any Defendant in the position of showing bad faith by the State's Prosecutor or intentionally waiving his constitutional right to be free from double jeopardy. This provision of the law places a burden of producing evidence upon the Defendant in a criminal case which is nearly impossible to show. By a subtle insertion of damaging, and otherwise inadmissible evidence, the State's probation agent forced this Defendant to request a mistrial, abandon a jury that he had chosen and approved, and also (absent the difficult showing of bad faith) waive his right to be free of double jeopardy.

POINT II

NO EVIDENCE WAS PRESENTED REGARDING THE MANNER OF USE OF THE ITEMS CLAIMED BY THE STATE OF UTAH TO BE DANGEROUS

WEAPONS.

This Defendant would argue to the court that the knives, throwing star, and num-chucks taken from the Defendant's possession can only be proven to be dangerous weapons for the purpose of supporting his conviction when those weapons are proven to have been used by the Defendant in a manner meeting the statutory definition for a dangerous weapon.(76-1-601 [5] and 76-10-501 [2][a], Utah Code Annotated, 1953, as amended) In the present case the State proved that these items were possessed by Mr. Vigil by showing that they were located in his motel room and also in his truck. However, the State did not establish that the items were ever used by Mr. Vigil in any fashion. The State offered expert testimony with regard to the throwing star and the num-chucks to indicate that they were martial-arts weapons, but this testimony was evenly balanced by the fact that there was also testimony showing that these items are also used by individuals simply practicing the martial arts and not using the items as dangerous weapons.

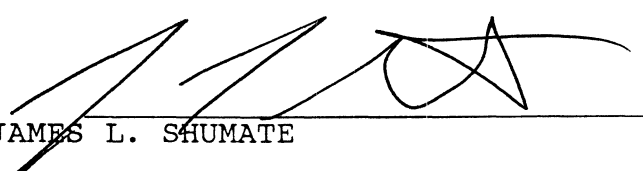
In both of the above-cited statutes, defining the term "dangerous weapon", the legislature has relied heavily on the concept of "use or intended use" in establishing whether or not an item is a "dangerous weapon". In 76-1-601 (5), Utah Code Annotated, 1953, as amended, an item (or a facsimile thereof) is a dangerous weapon if it is capable of causing death or serious bodily injury and the actor's use or apparent intended use of the item causes a victim to believe the item is likely to cause death

or serious bodily injury, or the actor represents to the victim that the actor has control of such an item. In 76-10-501 (2)(a), Utah Code Annotated, 1953, as amended, an item is a dangerous weapon if in the manner of its use or intended use it is capable of causing death or serious bodily injury. In this definition the legislature went on to say that if the item is not commonly known as a dangerous weapon its character, the character of any wound produced, or the manner in which it was used, are determinative. In both statutes the key to an item's existence as a dangerous weapon lies in its use. In this case there was no evidence of any use or intended use of the knives, throwing star, or num-chucks. Without such evidence, the proof is insufficient to support a conviction. This writer has searched the Utah cases on this issue and it appears to be a case of first impression.

CONCLUSION

For the reasons stated above, the Defendant's conviction should be reversed with instructions to the trial court on remand to dismiss the Information on the basis of double jeopardy or because there was insufficient evidence to sustain the conviction at trial on the issue of the use of the items in question.

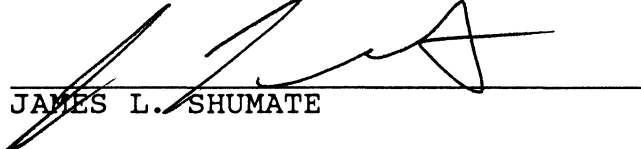
DATED this 3 day of May, 1990.



JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Paul Van Dam, Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 3 day of May, 1990, first class postage fully prepaid.



JAMES L. SHUMATE

76-10-501. Uniform law — Definitions.

(1) (a) The individual right to keep and bear arms being a constitutionally protected right, the Legislature finds the need to provide uniform laws throughout the state.

(b) The provisions of this part are uniformly applicable throughout this state and in all its political subdivisions and municipalities. No local authority may enact or enforce any rule in conflict with the provisions of this part.

(2) For the purpose of this part:

(a) "Dangerous weapon" means any item that in the manner of its use or intended use is capable of causing death or serious bodily injury. In construing whether an item, object, or thing not commonly known as a dangerous weapon is a dangerous weapon, the character of the instrument, object, or thing; the character of the wound produced, if any; and the manner in which the instrument, object, or thing was used are determinative.

(b) "Firearms" means pistols, revolvers, sawed-off shotguns, or sawed-off rifles, or any device that could be used as a weapon from which is expelled a projectile by any force.

(c) "Sawed-off shotgun" means a shotgun having a barrel or barrels of fewer than 18 inches in length, or in the case of a rifle, having a barrel or barrels of fewer than 16 inches in length, or any weapon made from a rifle or shotgun by alteration, modification, or otherwise, if the weapon as modified has an overall length of fewer than 26 inches.

(d) "Prohibited area" means any place where it is unlawful to discharge a weapon.

(e) "Crime of violence" means murder, voluntary manslaughter, rape, mayhem, kidnapping, robbery, burglary, housebreaking, extortion, or blackmail accompanied by threats of violence, assault with a dangerous weapon, assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable by imprisonment for more than one year, or an attempt to commit any of these offenses.

(f) "Bureau" means the Utah State Bureau of Criminal Identification.

1985

ADDENDUM

C O P Y

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH,
Plaintiff,
vs.
BILLY J. VIGIL,
Defendant.

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(
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Case No. 1327 Criminal
ABSTRACT FROM TRANSCRIPT
OF TRIAL HEARING

BE IT REMEMBERED, that the above-entitled
matter came on regularly for hearing before the Honorable
Cullen Y. Christensen, Judge Pro Tem of the above-entitled
Court, sitting with a jury, on the 25th day of September,
1989, at the Iron County Courthouse, Parowan, Utah;

That there appeared as counsel represen-
ting Plaintiff State of Utah, KYLE D. LATIMER, ESQ., Deputy
Iron County Attorney, and as counsel representing defendant,
JAMES L. SHUMATE, ESQ.

WHEREFORE, the following proceedings
were heard upon the afternoon of said trial date, commencing
at a point where the witness J. Lowe Barton was recalled to
the stand to testify as a defense witness:

- - -

MR. SHUMATE: I'll recall Agent Barton,

1 briefly, your Honor.

2 J. LOWE BARTON, having been called as
3 a witness, and having previously been first duly sworn and
4 having previously testified, was recalled as a witness and
5 testified as a defense witness, as follows:

6 CROSS EXAMINATION

7 BY MR. SHUMATE:

8 Q Agent Barton, in your capacity as the supervising
9 agent for Mr. Vigil, did you sit down and go through with
10 him and explain to him the activities that he could and
11 could not engage in as a parolee?

12 A Yes.

13 Q And that was reduced to a written agreement. Is
14 that correct?

15 A Yes, it was.

16 Q Did you ever discuss with him the size or number
17 or character of knives that he could or could not own as a
18 parolee?

19 A We never, as I recall, got into exact specifics
20 on knives sizes. In, I don't recall the date, but the, the
21 last time that he was convicted of a felony it was for pos-
22 session of a straight razor.

23 MR. SHUMATE: Excuse me, your Honor.

24 THE COURT: Just a minute.

25 MR. SHUMATE: May we excuse the jury and

1 allow me to make a motion?

2 THE COURT: Yes.

3 Then, ladies and gentlemen, if you'll step down
4 please. Don't discuss the case among yourselves, permit
5 anyone to discuss it with you, or enhance your information
6 concerning the matter.

7 (WHEREUPON, the Jury exited the courtroom at 2:20
8 o'clock p.m.)

9 MR. SHUMATE: Your Honor, at this time,
10 because of the response of Mr. Barton, I would first move
11 to strike the response as non-responsive. Second, I am
12 forced to ask for a mistrial because of the allusions by Mr.
13 Barton to the prior felony conviction of Mr. Vigil for
14 possession of a dangerous weapon by a restricted person,
15 which is one of Mr. Vigil's convictions out of April of
16 1986. That allusion by Mr. Barton I'm afraid has unfortun-
17 ately tainted this jury and we cannot go forward. Mr.
18 Latimer and I had reached an agreement to avoid that kind
19 of prejudice in the case, and now Mr. Barton has brought it
20 in.

21 THE COURT: Mr. Latimer.

22 MR. LATIMER: Your Honor, the state's
23 response; first of all, non-responsive: The question was,
24 "Did you ever discuss no possession of knives being in
25 violation of his parole?" And Agent Barton was responding

1 to that how he was going to get into the conviction, how he
2 explained to them, you know, "you've done it before, don't
3 do it again." But regarding his statement as to conviction,
4 I don't think it got out. All I heard was "possession of"
5 and Mr. Shumate cut him off. I don't think there has been
6 any undue influence. I'm not submitting that even if it
7 got to the jury that that would be reason for a mistrial,
8 because I think it's a relevant thing anyway although it may
9 not have come out at the right time. Primarily, I don't
10 think Mr. Barton specified what the conviction was. He
11 stated --

12 THE COURT: Well, let's have it read
13 back; Mr. Quist.

14 (WHEREUPON, the reporter read back the last
15 question and answer.)

16 MR. LATIMER: May I further address
17 that then?

18 THE COURT: Yes.

19 MR. LATIMER: It would be our position
20 it was brought out that he was convicted of possession of a
21 weapon. It wasn't brought out in a proper timing as far as
22 being against the defendant directly or as part of the public
23 record, but I don't think that's -- still think that's
24 admissible evidence. I don't think that's sufficient to
25 taint the jury. The big issue we had here today was his

1 intent for having that knife. And I think if it's going to
2 be in, if it's into the jury, then that goes to intent, it
3 goes to motive, it goes to motive operandi, it goes to
4 those various elements that makes something like that rele-
5 vant.

6 We'd submit it on that.

7 THE COURT: Any further, Mr. Shumate?

8 MR. SHUMATE: Your Honor, after listening
9 to the reporter's notes, it's very clear that my question
10 was much more narrow than the response that we got from Mr.
11 Barton..

12 I'll submit it.

13 THE COURT: Under Rule 609; purpose of
14 attacking the credibility of a witness: Evidence that the
15 witness has been convicted of a crime shall be admitted if
16 elicited from the witness or established by public record
17 during cross examination, but only if the crime (1) were
18 punishable by death or imprisonment. So that, on one.

19 Now, there's another section of the statute and
20 that's --

21 MR. LATIMER: I was referring to 404(b).

22 THE COURT: 404.

23 MR. LATIMER: Regarding what you just
24 read, 608, that's 609. The state was not asking the question.
25 So I don't think we've violated that rule.

1 THE COURT: Well, the Court would carry
2 on. That Rule 404(b) says: Evidence of other crimes,
3 wrongs or acts is not admissible to prove the character of
4 a person in order to show action in conformity therewith.
5 It may however be admissible for other purposes, such as
6 proof of motive, opportunity, intent, preparation, plan,
7 knowledge, identity or knowledge of a particular action.

8 Commentary states: Subdivision (b) deals with a
9 specialized but important application of the general
10 supplied -- circumstantial use of character evidence. Con-
11 sistently with that rule evidence of other crimes, wrongs
12 or acts is not admissible to prove character or as a basis
13 for suggesting the inference that conduct on a particular
14 occasion was in conformity with it.

15 Now in this case it's obvious the jury knows that
16 Mr. Vigil has been convicted of something; that these were
17 wrongs which amounts to a felony; that he was on parole or
18 was at the time that this incident occurred. Seems to me
19 that the statement however is more than just a statement of
20 fact that he's been convicted or has been convicted of some-
21 thing. It is of a specific type of charge that he, the
22 statement was made, similar charge, possession of a dangerous
23 weapon by a restricted person, possession of a straight
24 razor. Not dissimilar from what we've got here. And if you
25 go back to Rule 609; that is, immediately: The credibility

1 of the witness can be attacked by showing prior conviction
2 and this to be admitted unless the court determines the
3 probative value of admitting the evidence outweighs the pre-
4 judicial affect to the defendant.

5 I agree that these questions have not come up
6 from the standpoint of attacking credibility of the defen-
7 dant, in that sense, since he hasn't taken the stand. But
8 the inference is certainly very strong that if he was once
9 convicted for the same charge for which he stands trial
10 now, that that would have a tendency to reflect upon his
11 propensity to again commit the same charge, whether there
12 is a character trait that would tend to show that his actions
13 in this case were in conformity with his prior actions.

14 How do you get around that, Mr. Latimer?

15 MR. LATIMER: Actually, I feel like I'm
16 arguing to keep evidence in that came out on the defendant's
17 case. I'd be happy to strike that. I think it would be
18 sufficient for the Court to instruct the Jury that that was
19 an improper answer that they should disregard. They already
20 know he's committed a felony. They are not to take into
21 account what that felony was for. I think a cautionary
22 instruction is sufficient. I don't think it's so prejudicial
23 as to warrant a mistrial.

24 THE COURT: I was wondering if Mr. Vigil
25 was to attempt to take the stand, on a conviction for this

1 same type of -- is that admissible?

2 MR. LATIMER: I think that it's a felony,
3 that is only three years, I think is sufficient to go to his
4 credibility. I don't think the probative value outweighs
5 the prejudice. I think it's admissible under 604. I don't.
6 But again, if the Court wants to instruct the Jury to dis-
7 regard Mr. Barton's answer, the state's happy with that.
8 We don't care if it gets in or not, unless or until Mr.
9 Vigil testifies.

10 THE COURT: Anything further, Mr.
11 Shumate?

12 MR. SHUMATE: I'll submit it, your Honor.

13 THE COURT: Counsel, I don't see how I
14 can undo what I perceive to be the damage that has been done.
15 I don't think a cautionary instruction is going to be effec-
16 tive to take out of the mind of what I perceive to be a
17 something being brought to the attention of the jury that at
18 this point and maybe at no other point in the trial ought to
19 be before them. I recognize the inconvenience, the expense
20 and all of the trouble it causes; but on the other hand, I
21 think the defendant is entitled to a fair trial.

22 I'm going to grant your motion for a mistrial
23 in this case.

24 MR. SHUMATE: Thank you, your Honor.
25 I will prepare the appropriate pleadings and probably have

1 them --

2 THE COURT: You are subject of being
3 re-tried on this matter, Mr. Vigil.

4 THE DEFENDANT: State it again?

5 THE COURT: That doesn't mean that you
6 are not subject to a re-trial on this matter.

7 I am sensitive to the fact that I'm down here try-
8 ing to help out a situation to relieve the congestion of the
9 calendar. But I don't think the condition of the calendar
10 is something that ought to work to the disadvantage of one
11 who is entitled to a fair trial. I don't see how we can
12 get --

13 So, the motion is granted.

14 MR. SHUMATE: Thank you, your Honor.

15 THE COURT: Step down.

16 (WHEREUPON, the witness stepped down from the
17 witness stand.)

18 THE COURT: And if you will bring the
19 jury back in.

20 (WHEREUPON, the Jury returned into the courtroom
21 at 3:37 o'clock p.m.)

22 - - -

23 REPORTER'S CERTIFICATE

24 I, EDWARD V. QUIST, hereby certify that
25 I am an official court reporter, assigned to report for the

1 above-entitled Court, duly registered and licensed to
2 practice in the State of Utah; that on the 25th day of
3 September, 1989, I appeared before the above-named Court
4 and reported the proceedings had and testimony given in the
5 above-entitled cause of action; that the foregoing pages,
6 numbered from 1 to 9, inclusive, contain a true and accurate
7 transcript of an abstract from my stenographic notes, com-
8 prising the testimony of the witness J. Lower Barton recalled
9 as a defense witness and law matters subsequent thereto,
10 as taken in the above-entitled hearing, to the best of my
11 ability.

12 Dated at Provo, Utah this 11th day of
13 October, 1989.

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15
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17 Edward V. Quist, CSR
18 License No. 71
19 310 County Courthouse
20 51 South University
21 Provo, Utah 84601
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JAY LOWE BARTON

CALLED AS A WITNESS BY AND ON BEHALF OF THE STATE, BEING
FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. LATIMER:

Q PLEASE STATE YOUR NAME.

A JAY LOWE BARTON.

Q YOUR OCCUPATION?

A I'M A PROBATION AND PAROL AGENT FOR THE STATE OF
UTAH.

Q IN THAT POSITION, ARE YOU ACQUAINTED WITH BILLY
VIGIL TODAY?

A YES.

Q AND YOU WERE HIS SUPERVISOR?

A I WAS.

Q I WANT TO DRAW YOUR ATTENTION TO THE DATE OF JUNE
21, 1989, ABOUT 5:50. WERE YOU ON DUTY AT THAT TIME?

A I WAS.

Q WHERE WERE YOU?

A ON CEDAR CITY'S MAIN STREET, I BELIEVE.

Q WHAT WERE YOU DOING?

A I WAS WITH AGENT RON WODEHOUSE, SITTING RIGHT
THERE. WE WERE CONDUCTING SOME OTHER AGENCY-RELATED
BUSINESS OUT IN CEDAR CITY.

Q DID YOU HAVE OCCASION TO SEE MR. VIGIL AT THAT

1 TIME?

2 A YES.

3 Q DESCRIBE FOR THE JURY WHAT YOU OBSERVED.

4 A WE OBSERVED MR. VIGIL'S TRUCK PARKED IN FRONT OF
5 THE CEDAR POST PAWN SHOP ON APPROXIMATELY 175 NORTH MAIN IN
6 CEDAR CITY. MR. VIGIL AND A COUPLE OF OTHER INDIVIDUALS
7 WERE STANDING AROUND THE TRUCK, AND THERE WAS TWO OR THREE
8 COLORED TELEVISIONS IN THE BACK OF THE PICKUP.

9 Q ALRIGHT. WHAT DID YOU DO IN RELATION TO WHAT YOU
10 SAW?

11 A THE TELEVISIONS IN THE BACK OF THE PICKUP WERE
12 WHAT ORIGINALLY CAUSED CONCERN, AND SO AFTER WE COMPLETED
13 OUR BUSINESS WE WENT TO THE PAWN SHOP TO CHECK AND SEE WHAT
14 MR. VIGIL HAD BEEN DOING. HE HAD LEFT BY THEN.

15 Q OKAY. FROM WHAT YOU FOUND OUT, WAS HIS BUSINESS
16 WITH THE TELEVISIONS LEGITIMATE?

17 A YES, IT WAS.

18 Q DID THE CLERK SAY ANYTHING -- DID YOU SPEAK TO
19 THE CLERK AT THE STORE?

20 A YES.

21 Q DID HE OR SHE SAY ANYTHING THAT WOULD CAUSE YOU
22 CONCERN?

23 A YES. SHE ADVISED US MR. VIGIL HAD BEEN BUYING
24 THE TELEVISIONS FROM THE MOTEL WHERE HE WAS EMPLOYED, THAT
25 THEIR PURCHASE WAS LEGITIMATE. SHE THEN ADDED SHE WAS GLAD

1 THEY LEFT BECAUSE MR. VIGIL AND HIS ASSOCIATES WERE
2 INTOXICATED.

3 Q DID THAT ALSO CAUSE YOU CONCERN?

4 A YES, IT DID.

5 Q WHY?

6 A HE HAS 'OR HE HAD A CLAUSE IN HIS PAROL AGREEMENT
7 THAT PROHIBITED HIM FROM CONSUMING OR POSSESSING ALCOHOL.

8 Q WHAT DID YOU OR AGENT WODEHOUSE DO?

9 A AT THAT POINT WE DROVE TO MR. VIGIL'S APARTMENT.
10 HE AND HIS ROOMMATE WERE THERE, AND WE ASKED MR. VIGIL IF HE
11 HAD BEEN CONSUMING ALCOHOL, THAT WE HAD HAD SOME REPORTS
12 THAT HE HAD, AND EXPLAINED TO HIM WHERE WE RECEIVED THE
13 INFORMATION.

14 Q WHAT DID HE SAY?

15 A AT FIRST HE SAID HE HADN'T. HE LATER INDICATED
16 THAT HE HAD.

17 Q WHAT DID HE INDICATE SPECIFICALLY?

18 A THAT HE HAD HAD A COUPLE OF DRINKS.

19 Q WHAT DID YOU DO IN RESPONSE TO HIS ADMISSION TO
20 HAVING HAD ALCOHOL?

21 A ASKED HIM TO SUBMIT TO A FIELD INTOXILIZER TEST.
22 WE HAVE A SMALL, PORTABLE INTOXILIZER.

23 Q DID THAT INDICATE POSITIVE FOR ALCOHOL?

24 A YES, IT DID.

25 Q THEN WHAT DID YOU DO?

1 A MR. VIGIL WAS TAKEN INTO CUSTODY AT THAT TIME,
2 WHICH IS STANDARD PROCEDURE.

3 WE CHECKED THE APARTMENT TO SEE -- WE WERE MAINLY
4 LOOKING FOR ALCOHOLIC BEVERAGES AT THE TIME.

5 Q AND DESCRIBE FOR THE JURY WHAT ITEMS YOU HAD
6 OCCASION TO LOOK THROUGH.

7 A WE LOOKED THROUGH -- WE CHECKED THE REFRIGERATOR
8 IN THE KITCHEN, MR. VIGIL'S BEDROOM AREA, HIS PERSONAL
9 BELONGINGS.

10 Q DID YOU LOOK THROUGH A DUFFLE BAG?

11 A WE DID.

12 Q WAS THAT DUFFLE BAG IDENTIFIED TO YOU AS MR.
13 VIGIL'S?

14 A YES, IT WAS.

15 Q WHO MADE THAT IDENTIFICATION?

16 A MR. VIGIL'S ROOMMATE. MR. VIGIL WAS AT THAT
17 POINT IN CUSTODY IN THE VEHICLE.

18 Q ALRIGHT. DID YOU FIND ANYTHING OF INTEREST IN
19 THAT DUFFLE BAG?

20 A YES, WE DID.

21 Q DESCRIBE GENERALLY WHAT YOU FOUND.

22 A MAY I REFER TO MY NOTES?

23 Q IF THAT WILL HELP TO REFRESH YOUR RECOLLECTION,
24 PLEASE DO.

25 A WE FOUND A COUPLE OF LARGE KNIVES AND ALSO A PAIR

1 OF NUN-CHUCKS AND A THROWING STAR, WHICH IS A MARSHAL ARTS
2 WEAPON.

3 Q LET ME, IF I MAY, SHOW YOU WHAT'S BEEN MARKED
4 PREVIOUSLY -- WHAT'S IDENTIFIED AS STATE'S EXHIBIT 1. DO
5 YOU RECOGNIZE THAT ITEM?

6 A YES, I DO. THAT'S ONE OF THE LARGE KNIVES THAT
7 WAS IN THE DUFFLE BAG.

8 Q HOW ABOUT STATE'S EXHIBIT 2, DO YOU RECOGNIZE
9 THAT ITEM?

10 A YES. THAT'S A BOOT KNIFE ALSO IN THE DUFFLE BAG.

11 Q I ALSO SHOW YOU STATE'S EXHIBIT 3. DO YOU
12 RECOGNIZE THAT ITEM?

13 A YES. THOSE ARE THE NUN-CHUCKS IN THE DUFFLE BAG.

14 Q STATE'S EXHIBIT 4, DO YOU RECOGNIZE THAT ITEM?

15 A YES. IT'S A THROWING STAR. IT'S A MARSHAL ARTS
16 WEAPON THAT WAS ALSO LOCATED IN THE DUFFLE BAG.

17 Q DID YOU HAVE OCCASION TO LOOK IN THE TOOL BOX
18 BELONGING TO MR. VIGIL?

19 A YES, WE DID.

20 Q WHAT DID YOU FIND THERE OF INTEREST?

21 A A FISH FILET KNIFE IN THE TOOL BOX LOCATED IN THE
22 BED OF HIS PICKUP.

23 Q LET ME SHOW YOU WHAT'S BEEN MARKED STATE'S
24 EXHIBIT 6. DO YOU RECOGNIZE THAT?

25 A YES. THAT'S THE FILET KNIFE THAT WAS LOCATED

1 THERE.

2 Q YOU SAY THE TOOL BOX WAS IN MR. VIGIL'S PICKUP?

3 A YES.

4 Q DID YOU FIND ANYTHING ELSE IN THE PICKUP?

5 A THERE WAS A KNIFE THAT WAS LOCATED UNDER THE
6 DRIVER'S SIDE SEAT.

7 Q LET ME SHOW YOU WHAT'S BEEN MARKED STATE'S
8 EXHIBIT 5. DO YOU RECOGNIZE THAT ITEM?

9 A YES. THAT'S A KNIFE THAT WAS UNDER THE SEAT OF
10 THE PICKUP.

11 Q ALRIGHT. DID YOU HAVE OCCASION TO LOOK IN ANY OF
12 MR. VIGIL'S CLOTHING?

13 A WE WENT THROUGH SOME OF HIS CLOTHES LOOKING FOR
14 WEAPONS AND ALCOHOL AT THAT POINT.

15 Q OKAY. DID YOU FIND ANYTHING IN HIS CLOTHING THAT
16 DREW YOUR ATTENTION?

17 A YES, WE DID. I BELIEVE IT WAS AGENT WODEHOUSE
18 THAT FOUND THAT ITEM, THOUGH.

19 MR. LATIMER: YOUR HONOR, AT THIS TIME I WOULD
20 MAKE A MOTION FOR THE ADMISSION OF STATE'S EXHIBITS 1, 2, 3,
21 4, 5 AND 6.

22 MR. SHUMATE: YOUR HONOR, MAY COUNSEL APPROACH
23 THE BENCH OFF THE RECORD?

24 THE COURT: YOU MAY.

25 (WHEREUPON AN OFF-THE-RECORD DISCUSSION WAS